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U.S. Department of Homeland Security
20 Mass Ave. N.W., Rm. 3000,
Washington, DC 20529

U.S. Citizenship and Immigration Services

H3

PUBLIC COPY

[redacted]

FILE: [redacted] Office: ATHENS Date: JAN 10 2007

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Officer in Charge, Athens, Greece, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Israel who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant is the spouse of a U.S. citizen and the stepfather of a U.S. citizen child. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse and child.

The acting officer in charge concluded that the applicant failed to establish a qualifying family member would suffer extreme hardship and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Officer*, dated February 10, 2005.

The record reflects that, on February 5, 1985, the applicant was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay. On June 15, 1990, the applicant became a conditional resident of the United States by virtue of his marriage to [redacted] (Ms. [redacted], a U.S. citizen. On December 19, 1991, in the Circuit Court of Cook County Illinois, the applicant pled guilty to and was convicted of possession of a controlled substance with intent to deliver-cocaine, in violation of Chapter 56-½, section 1401c(7) of the Illinois 1989 Revised Statutes. The applicant was sentenced to 20 months of probation. On June 29, 1992, the applicant filed an Application to Remove Conditions on Residence (Form I-751). On November 10, 1992, in the Circuit Court of Cook County, the applicant pled guilty to and was convicted of harassment by telephone in violation of Chapter 134, section 16.4-1(5) of the Illinois 1989 Revised Statutes. The applicant was sentenced to one year of supervision. On December 4, 1992, the applicant was placed into proceedings. On March 16, 1993, after the applicant had divorced Ms. [redacted] and failed to appear at scheduled interviews to remove conditions, the Form I-751 was denied and the applicant's conditional residence was terminated. The immigration judge ordered the applicant removed on September 8, 1993. The applicant filed an appeal to the Board of Immigration Appeals (BIA). On April 7, 1999, the applicant married his current spouse, [redacted] (Ms. [redacted], a U.S. citizen. On May 28, 1999, the BIA dismissed the applicant's appeal. Despite being issued a warrant for removal, the applicant failed to report for removal or to depart the United States. On July 26, 1999, Ms. [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On February 8, 2000, the Form I-130 was approved. In February 2000, the applicant returned to Israel where he has since resided.

On appeal, counsel asserts that the acting officer in charge erred in finding that the applicant failed to establish extreme hardship to a qualifying family member. *See Applicant's Brief* dated June 8, 2005. In support of the appeal, counsel submitted only the referenced brief. The entire record was reviewed and considered in rendering a decision in this case.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

(1) Criminal and related grounds. —

(A) Conviction of certain crimes. –

(i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) *and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana* . . . . (emphasis added.)

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

. . . .

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

. . . .

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The acting officer in charge based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's admission to and records establishing the applicant's unlawful presence in the United States and counsel does not contest the acting officer in charge's determination of inadmissibility.

The AAO also finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), as an alien who has been convicted of a crime relating to a controlled substance. The AAO conducts the final administrative review and enters the ultimate decision for Citizenship and Immigration Services (CIS) on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the acting office in charge does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

The applicant pled guilty to possession of a controlled substance-cocaine-with intent to deliver and was sentenced to 20 months of probation. Counsel asserts that the applicant's conviction for possession with intent to distribute was set-aside under state law. However, the record does not reflect that the applicant's conviction was set-aside. Moreover, section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) **a judge or jury has found the alien guilty or the alien has entered a plea of** guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

A section 212(h) waiver is generally not available to section 212(a)(2)(A)(i)(II) cases involving controlled substance crimes. Indeed, the Act makes it very clear that the section 212(h) waiver applies only to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. In this case, the applicant was convicted of possession of cocaine with intent to deliver. The AAO finds that the Act provides for no waiver for the applicant's ground of inadmissibility. Therefore, the applicant is statutorily ineligible for a waiver.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his U.S. citizen wife and children, or merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.